FILE COPY

JUN 11 1970

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969
No. 1548

JOSEPH MAIORANI,

Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,

Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,

Respondent.

REPLY BRIEF

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, New York
Telephone: (212) BArclay 7-2618

THE DICK BAILEY PRINTING SERVICE Telephone: (212) 447-5358

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969
No. 1548

JOSEPH MAIORANI,

Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,

Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,

Respondent.

BRIEF IN REPLY TO THE BRIEFS SUBMITTED BY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Both briefs submitted in opposition to the petition for a writ of certiorari in the above matter completely sidestep the basis for the petition.

Pursuant to the decision below, an attorney would be subjected to an action for malpractice if called to two Courts at the same time.

Under those circumstances, it would be necessary for him to miss one or the other engagement and a busy practitioner would find himself in a situation where he would be constantly subjected to a malpractice action.

This, obviously, affects almost every attorney engaged in practice before our Courts. It involves a grave and basic concept of practice.

The zeal for a well balanced calendar must be balanced against the meting out of justice to litigants coming before the Court.

The case of *Flaksa v. Little River Marine Construction Co.*, 389 F. 2d 885 (1968), decided by the United States Court of Appeals for the Fifth Circuit, on February 8, 1968, discussed the legal concept involved in a comprehensive and enlightened manner. In that case, an action was dismissed for failure of counsel to appear at a pretrial conference after a long history of delays. The Court there stated:

(page 886)

"The basis for the order was that appellant's proctor had "failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects", and that the sum total of his conduct amounted to a failure to prosecute his claim with reasonable diligence. A motion by appellant for rehearing under Rule 60 (b), F.R. Civ. P. was overruled. The case is now before us on the whole question of whether the order was too drastic under the circumstances.

The order in question was entered after the appellant's proctor having the responsibility for trying the case failed to appear at a pre-trial conference. There was a background of that proctor's dereliction and failure to meet his responsibilities at every stage of this proceeding from the time issue was joined."

* * * *

(pages 887, 888)

"Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations,[6] as the court has a wide range of lesser sanctions.[7] These rules are applicable to admiralty proceedings.[8]

[6] This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases,[9] has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of Durham v. Florida East Coast Ry. Co., 385 F. 2d 366,

---

[Footnote 7 by the Court] Woodham v. American Cystoscope Company of Pelham, N. Y., 5 Cir., 335 F.2d 551, 556 (1964). See also: Annotation: Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order, 4 A.L.R.2d 348; Waterman, An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders. 29 F.R.D. 420 (1961); Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480 (1958); Comment, Sanctions at Pre-Trial Stages, 72 Yale L.Jour. 819 (1963); 3 Moore, Federal Practice, 2d ed. pp. 1129-1130.

where Judge Wisdom, after recognizing the inherent power now under discussion, said: " * * * The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff * * * " Other cases by this Court emphasizing the importance, except in the most flagrant circumstances, of resorting to sanctions that do not deprive a litigant of his day in court are Woodham v. American Cystoscope Company of Pelham, 5 Cir., 335 F.2d 551 (1964), and Council of Federated Organizations v. Mize, 5 Cir., 339 F.2d 898 (1964). We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both. The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.[10]

* * * *

(page 889)
"We are conveinced that the above trial judge was more than patient under the circumstances, but we feel that he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. * * * There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute."

This Court should interpret the provisions of Rule 60 (b) of the F.R.C.P.

It is respectfully submitted that Rule 60 (b) constitutes a remedial procedure and should be liberally construed.

When all the prerequisites for relief under Rule 60 (b) are present as were in the case at bar, it is an abuse of discretion to deny the relief provided for by the provisions of that Rule.

The decision by the Court below merits review as it unjustly affects every attorney having two or more cases for trial at the same time and said decision is in clear and unquestionable conflict with the decision by the United States Court of Appeals for the Fifth Circuit in *Flaksa v. Little River Marine Construction Co., supra.* All litigants are also affected as they are in jeopardy of being denied their day in court on the merits in the interests of expediency of reducing calendar congestion and being relegated to a questionable malpractice action in place of a meritorious cause of action.

CONCLUSION

The briefs in opposition are based on sophistry, contain no support in fact or law and does violence to the interests of substantial justice.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner